

The Honorable Justin Quackenbush

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MICHAEL KIRBY,

**Plaintiff.**

V.

CITY OF EAST WENATCHEE, and  
OFFICER JAMES MARSHALL;

### Defendants.

No. CV 12-190-JLQ

**PLAINTIFF'S RESPONSE IN  
OPPOSITION TO DEFENDANTS'  
MOTION FOR PROTECTIVE  
ORDER RE DEFENDANT  
OFFICER MARSHALL'S PRE-  
EMPLOYMENT  
PSYCHOLOGICAL  
ASSESSMENTS AND  
POLYGRAPH EXAMS**

Hearing date: July 30, 2012

6:30 P.M.

## **WITHOUT ORAL ARGUMENT**

Plaintiff files this response in opposition to Defendants' "Motion for Protective Order re Defendant Officer Marshall's Pre-Employment Psychological Assessments and Polygraph Exams." (Dkt. #26) Defendants'

1 motion is directly contrary to well-settled law and should be denied. Should the  
2 Court deny Defendants' motion, Plaintiff requests that the Court deny any  
3 request to have the materials deemed "confidential."  
4

## 5 I. STATEMENT OF FACTS

6 As the Court is aware, this case involves § 1983 and negligence claims  
7 against the City of East Wenatchee Police Department ("EWPD") and Officer  
8 James Marshall, an EWPD employee. On April 5, 2009, Officer Marshall shot  
9 Plaintiff Mike Kirby through the his left jaw from approximately 70 yards away  
10 while Mr. Kirby was standing on his front porch, speaking with a Wenatchee  
11 police officer. Despite the significant wounds that Officer Marshall inflicted  
12 upon Mr. Kirby, he survived the shooting, though he is now severely disabled,  
13 unable to speak, and can consume only a liquid diet.  
14

15 In the course of discovery, Plaintiff received portions of Defendant  
16 Marshall's EWPD employment file. Inserted within that file were objections to  
17 the release of a pre-employment psychological assessment and records of  
18 Defendant Marshall's pre-employment polygraph test.  
19

20 Based upon the aforementioned information, Plaintiff had a phone  
21 conference with defense counsel, which was followed by a letter dated June 18,  
22 2012, requesting the redacted records. The Defendants have objected to the  
23 release of this information, and Plaintiff opposes Defendants' motion for entry

1 of a protective order.

2           **II.     LEGAL AUTHORITY & ARGUMENT**

3           **A. The redacted information is relevant to this case, or, at a minimum,  
4 reasonably likely to lead to the discovery of admissible evidence.**

5           Pursuant to FRCP 26(b)(1) a party may obtain discovery regarding any  
6 matter that is reasonably calculated to lead to the discovery of admissible  
7 evidence.

8           Parties may obtain discovery regarding any nonprivileged matter  
9 that is relevant to any party's claim or defense--including the  
10 existence, description, nature, custody, condition, and location of  
11 any documents or other tangible things and the identity and  
12 location of persons who know of any discoverable matter. For  
13 good cause, the court may order discovery of any matter relevant  
14 to the subject matter involved in the action. Relevant information  
need not be admissible at the trial if the discovery appears  
reasonably calculated to lead to the discovery of admissible  
evidence.

15 FRCP 26(b)(1).

16           Plaintiff Mike Kirby has a reasonable belief that the redacted material  
17 from Defendant Marshall's employment files will lead to the discovery of  
18 admissible evidence. It is not disputed that Defendant Marshall shot Mr. Kirby  
19 from 70 yards away while Mr. Kirby was speaking to a Wenatchee police officer  
20 who was just across the street. It is also undisputed that the Wenatchee officer  
21 did not feel the need to use deadly force on Mr. Kirby, as he never fired his  
22 weapon at him. Questions as to why Defendant Marshall felt it was necessary to

1 use such force, and whether he is more inclined to use deadly force than a  
2 reasonably prudent officer go directly to the central issues of this case. His  
3 psychological records, which may indicate a predilection for violence, as well as  
4 EWPD's awareness and or/response to that information, are relevant and,  
5 therefore, discoverable. Evidence relating to Defendant Marshall's veracity, his  
6 decision-making process, his disposition toward violence, his habits or routine  
7 practices as an officer, and any previous events in his life that may affect his  
8 ability to perform his duties as a policies officer without violating the civil rights  
9 of civilians are also relevant and discoverable.

11       Investigation into Defendant Marshall's background has also revealed that  
12 he may have been the subject of an allegation of excessive force while working  
13 as an officer, prior to being hired by EWPD. The basis for these allegations,  
14 Defendant Marshall's disclosure of these allegations, and EWPD's response  
15 and/or investigation into Defendants Marshall's past are relevant to Plaintiff's  
16 claims. Furthermore, this information is not likely to be discoverable through  
17 any other means.  
18

20       As Defendants admit in their moving brief, "Defendant officer underwent  
21 the assessments and exams solely for the purpose of determining whether he  
22 would be a suitable police officer...." (Dkt. #26, p. 7). Whether Defendant  
23 Marshall qualified as a suitable police officer is precisely the reason why the

1 requested materials are relevant to this matter, and it is reasonable to believe that  
 2 his full police department employment files may lead to the discovery of  
 3 admissible evidence.

4

**5           B. Plaintiff's interest in obtaining the requested materials far outweighs  
      any purported disadvantages claimed by Defendants.**

6           “The scope of an evidentiary privilege in a...civil rights claim is a  
 7 question of federal law.” *Breed v. U.S. Dist. Court for Northern Dist. Of*  
 8 *California*, 542 F.2d 1114, 1115 (9th Cir. 1976) (citing *Kerr v. United States*  
 9 *District Court*, 511 F.2d 192, 196 (9th Cir. 1975) (affirming “district court’s  
 10 holding of personnel files relevant for discovery purposes.”). To determine  
 11 whether the information sought is privileged, courts weigh the potential benefits  
 12 of disclosure against its potential disadvantages.

13

**14           1. Federal common law supports disclosing Defendant  
      Marshall’s complete personnel files.**

15           In cases involving civil rights violations, courts lean in favor of disclosing  
 16 official documents. “In the context of civil rights suits against police  
 17 departments, [the] balancing approach should be ‘moderately pre-weighted in  
 18 favor of disclosure.’” *Soto v. City of Concord*, 162 F.R.D. 603, 613 (N.D. Cal.  
 19 1995) (quoting *Kelly v. City of San Jose*, 114 F.R.D. 653, 661 (1987)). Courts  
 20 addressing similar challenges in the context of § 1983 cases have noted that “the  
 21 policies underlying civil rights laws, public confidence in the court system, and  
 22

1 in doing individual justice outweigh[] both the police department's desire for  
 2 secrecy and privacy rights of officers or citizen complainants." *Soto*, 162 F.R.D.  
 3 at 613 n. 3 (citing *Kelly*, 114 F.R.D. at 661).

4 Courts consistently hold that police personnel files and related documents  
 5 are relevant and discoverable in civil rights cases. *Dowell v. Griffin*, 275 F.R.D.  
 6 613, 617 ("[P]rivacy interests police officers have in their personnel files do not  
 7 outweigh plaintiff's interests in civil rights cases.") and see also *Green v. Baca*,  
 8 226 F.R.D. 624, 644 (C.D. Cal. 2005) (noting that "courts have repeatedly held  
 9 that police personnel files and documents are relevant and discoverable"). In  
 10 *Soto v. City of Concord*, a § 1983 excessive force claim against a city and police  
 11 officers, the court ordered the city-defendant to disclose the personnel files of  
 12 the defendant-officers. Although that case did not specifically address pre-  
 13 employment psychological and polygraph records, the court articulated the  
 14 rationale behind disclosure of personnel records:

15 The personnel files of the defendant-officers in the instant case are  
 16 relevant to Plaintiff's excessive force claim. The personnel files  
 17 contain employee performance appraisals which contain  
 18 information on each officer's ethics, interpersonal relationships,  
 19 decision making abilities, work and safety habits, and crime scene  
 20 management techniques. They also contain information  
 21 on...interviews, employee orientation, and employment  
 22 applications. Each of these types of documents may be quite  
 23 relevant to issues involved in Plaintiff's excessive force claim,  
 because such documents may reveal the defendant officers' patterns  
 of behavior, as well as the City's response to such behavior.

1  
2        *Soto*, 162 F.R.D. 162 at 615. The Court should adopt the rationale set forth  
3 under *Soto*.

4        Furthermore, Plaintiff Mike Kirby will not be able to discover the  
5 information contained in the pre-employment records by any other means. In  
6 *Soto*, the court determined that the facts weighed in favor of disclosure, in part,  
7 because the requested material was otherwise undiscernable.

8        In the case at bar, and in civil rights cases against police  
9 departments in general, it is not likely that plaintiffs can obtain  
10 information of comparable quality from any other source. [Citation  
11 omitted]. Thus, discovery of the police personnel files is the only  
12 way through which Plaintiffs will have access to the information  
13 contained within.

14        *Soto*, 162 F.R.D. 162 at 616. Information about Defendant Marshall's  
15 psychological stability and predilection for violence, and EWPD's response to  
16 this information, is highly relevant to Plaintiff's excessive force claim. As in  
17 *Soto*, there are no alternative venues through which Plaintiff will be able to learn  
18 this information. Therefore, the facts weigh in favor of disclosure, and  
19 Defendants' motion should be denied.

20              **2. The cases relied up on by Defendants are inapposite.**

21        Defendants rely upon unpublished, irrelevant case law to support their  
22 argument. The court in *Hallon v. City of Stockton*, 2012 WL 3942000 (E.D. Cal.  
23 2012), based its decision, in large part, on unique California statutes and rules of

evidence that limited the disclosure of officer personnel records through discovery. *Hallon* at \*5. Defendant has conceded that “[i]n civil rights cases brought under federal statutes, questions of privilege are resolved by federal law.” *Hampton v. City of San Diego*, 147 F.R.D. 227, 228, 230 (S.D. Cal. 1993). (Dkt. #26, p. 6) Because this is an issue properly decided under federal law, Defendants’ reliance on *Hallon* is misplaced. Likewise, Defendants neglected to inform that Court that in *Holmes v. Henry*, 2011 WL 5075012 (E.D. Ark. 2011), the district court’s protective order did not completely bar the plaintiff from obtaining the personnel files. Rather, the defendants in that matter were “willing to provide the personnel files and citizens complaints sought by Plaintiff” if a number of conditions were met, including destruction at the conclusion of litigation. *Holmes* at \*2-3. The Court should deny Defendants’ motion.

### **III. CONCLUSION**

The material contained within Defendant Marshall’s employment files is highly relevant and will lead to the discovery of admissible evidence. Plaintiff should have the opportunity to thoroughly review Defendant Marshall’s complete employment files from his work as a police officer.

Accordingly, Plaintiff respectfully requests that this Court enter an order denying Defendants’ motion, and include in that order a statement that

1 Defendants' request to have any portion of the employment files deemed  
2 "confidential" be denied.

3 Respectfully submitted this 13th day of July, 2012.  
4

5 CONNELLY LAW OFFICES  
6

7 By /s/ Anna L. Price  
8 Anna L. Price, WSBA No. 43088  
9 2301 North 30th Street  
10 Tacoma, WA 98403  
11 Phone: (253) 593-5100  
12 E-mail: [aprice@connelly-law.com](mailto:aprice@connelly-law.com)  
13 Attorney for Plaintiff  
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1                   CERTIFICATE OF SERVICE

2                   I hereby certify that on this date I electronically filed the foregoing with  
3                   the Clerk of the Court using the CM/ECF System which will send notification of  
4                   such to the following:

5                   jbaker@canfieldsolutions.com  
6                   James E. Baker  
7                   Jerry J. Moberg & Associates

8                   jmoberg@canfieldsolutions.com  
9                   Jerry Moberg  
10                  Jerry J. Moberg & Associates

11                  \_\_\_\_\_  
12                  /s/ *Anna L. Price*  
13                  Anna L. Price  
14                  Connelly Law Offices  
15                  2301 North 30<sup>th</sup> Street  
16                  Tacoma, WA 98403  
17                  Telephone: (253) 593-5100  
18                  Fax: (253) 593-0380  
19                  Email: aprice@connelly-law.com